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February 2, 2001

Mark J. Langer, Esq.
Clerk of the Court
United States Court of Appeals for the
District of Columbia Circuit
333 Constitution Avenue, NW - Room 5423
Washington, DC 20001-2866

Re: United States v. Microsoft Corp., No. 00-5212 (consolidated with 00-5213): Submission of Laura Bennett Peterson, amicus curiae, regarding a proposed format for oral argument

Dear Mr. Langer:

I write, pursuant to your Court's Order of January 22, 2001, regarding a proposed format for oral argument. As you know, Circuit Rule 34(e) permits an amicus to participate in such argument with "leave of the court granted for extraordinary reasons on motion." "Extraordinary reasons," I submit, warrant such leave,[*] so that the Court may hear argument from both sides on the important issues identified herein. The same "extraordinary reasons" explain this submission today, which I have discussed with the parties' counsel.

The Court, recognizing the extraordinary importance of this case, decided *sua sponte* to hear this case *en banc* and set aside up to two days for oral argument. I respectfully suggest that two hours of this time be allocated equally to the two issues identified herein, in the order presented herein. I do not consider here other issues that each side has developed in written submissions (including, I expect, submissions today), nor do I suggest the order of the full range of issues that may warrant oral argument.

The first issue I proffer for oral argument is, following this Court's lead, "Microsoft's role in the software industry and some of the industry's economics." United States v. Microsoft Corp., 147 F.3d 935, 939 (D.C. Cir. 1998) (citing this Court's approach in 1995 to another Microsoft case). I refer, more specifically, to the "applications barrier to entry," the defective linchpin of Appellees' case. See Peterson Brief, Argument I, at 5-15.

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[*] If the Court wishes to hear oral argument on the issues identified herein, I will request such leave by a motion to be filed, in accordance with the above Circuit Rule, "at least 14 days prior to the date oral argument is scheduled."

Microsoft's Reply Brief incorrectly states: "The nature of the purported applications barrier to entry is clear from plaintiffs' brief: consumers currently *prefer* Windows over competing platforms because it supports a large array of compatible applications (the so-called 'network effect')." Reply Brief at 20; *accord*, Microsoft's [Initial] Brief at 94. As my Brief points out, factors other than network effects -- such as increasing returns, improved product quality, and superior efficiency -- underlie the "applications barrier to entry." *See* Peterson Brief at 3, 7, 10-11, 15; United States v. Microsoft Corp., 84 F. Supp. 2d 9, 20, 43-44 (¶¶ 38, 135) (D.D.C. 1999); United States v. Microsoft Corp., 87 F. Supp. 2d 30, 39 (D.D.C. 2000); *see also* Brief for Appellees United States and the State Plaintiffs at 58 (noting "high fixed costs" but failing to note declining average costs through low marginal costs).

This is not to say that factors such as these are properly considered barriers to entry. *Compare* Peterson Brief at 7-9, 15 *with* Appellees' Brief at 58 (misleadingly calling it "hornbook antitrust law that a barrier to entry is 'any factor that permits firms already in the market to earn returns above the competitive level while deterring outsiders from entering'"). As my Brief further argues (at 22-24), the inchoate definition, by Appellees and the district court, of the "applications barrier to entry" justifies, under this Court's approach in Barbour v. Browner, 181 F.3d 1342, 1345 (D.C. Cir. 1999), *de novo* review of the district court's findings on barriers to entry. The further lack of clarity and impropriety of Appellees' approach to other asserted barriers to entry, *see* Appellees' Brief at 57-60, also justifies focused attention to barriers to entry in the oral arguments.

It should not have to be emphasized that antitrust cases call for careful economic analysis. Yet in discussing the "applications barrier to entry" into the narrowly-defined operating system market, Microsoft does not even mention, let alone analyze, the views of Appellees' economic experts in declarations supporting the proposed remedy, *compare* Microsoft's Brief at 93-97 & Reply Brief at 20-22 *with* Peterson Brief at 6-7, 10 n.8, 11-14, even though the purported impact on this "barrier" was the hazy lens through which Appellees and the district court viewed Microsoft's conduct and spied supposedly justified relief, *see* Appellees' Brief at 63-65, 120-22 (asserting, but not showing, a positive effect from divestiture on the "applications" and other claimed barriers to entry, which all seem to boil down to the "applications barrier to entry").

The conclusion of both Microsoft's Briefs and my Brief is, however, the same: The judgment below should be reversed; any aspect of the judgment that is not reversed, and that requires a new trial, should be remanded to a different trier of fact. I concur, moreover, with Microsoft's analysis of the relevant antitrust law. I submit these caveats to Microsoft's treatment of entry barriers, and these profound differences with respect to Appellees' treatment thereof, to (a) highlight the need for clarification by the Court on this issue and (b) suggest that I, more appropriately than Microsoft, might address this issue at oral argument thereon.

I proffer, as a second issue for oral argument on my part, the appropriate standard for appellate review of the findings of fact. Microsoft devotes less than a paragraph of its 150 page Brief to this issue, which I consider at length. *Compare* Microsoft's Brief at 68 *with* Peterson Brief, Arguments II and III, at 15-24. Microsoft suggests, in its Brief at 146-50, that bias or the reasonable appearance of bias warrants vacating the judgment below as to any claims that

survive appeal; its Reply Brief more squarely suggests, as does my Brief, that such considerations warrant heightened scrutiny of the facts. *See* Microsoft's Reply Brief at 3, 7, 75; Peterson Brief at 17-18. Microsoft also advances for the first time, *see* Reply Brief at 2-3, a partial summary of my Brief's argument about the impetus behind, and errors from, the bifurcation of findings of fact from conclusions of law, *see* Peterson Brief at 1-3, 19-20.

Finally, Microsoft assumes that the findings of fact must be examined under the "clearly erroneous" standard. *See* Microsoft's Brief at 68 and Reply Brief at 7. It neglects even to mention the less deferential *de novo* standard of review that should be applied to conclusions of law, even if they are denominated findings of fact. *See* Peterson Brief at 20-21. Relatedly, Microsoft fails to mention in either of its Briefs the implications, addressed in my Brief at 19-24, of the mixed questions of law and fact that this "rule of reason" antitrust case presents. In so doing, Microsoft ignores what is, at least in hindsight, a signal by this Court that *de novo* review might be warranted. *See* United States v. Microsoft, *supra*, 147 F.3d at 945 n.7, *discussed in* Peterson Brief at 22.

The classic role of an amicus is to supplement the efforts of counsel with a view to assisting the court in a case of general public interest. Miller-Wohl Co. v. Commissioner of Labor and Indus., 694 F.2d 203, 204 (9th Cir. 1982). I hope in this case to provide a perspective, grounded in law and economics, that the parties, even with accomplished and experienced counsel, neglect. It is with this hope in mind that I submit this letter regarding a proposed format for oral argument.

I appreciate the Court's consideration.

Respectfully submitted,

Laura Bennett Peterson

cc: Counsel listed in attached certificate of service

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2001, I served a copy of the foregoing letter of Laura Bennett Peterson, Amicus Curiae, to Mark J. Langer, Esq., Clerk of the Court, regarding a proposed format for oral argument, on: (1) a listed counsel for each of the participants identified in the Certificate of Service submitted with the Brief for Appellees United States and the State Plaintiffs (Messrs. Smith, Boe, Falk, Black, Cohen, Getman, Bork, and Burton), at the addresses provided therein, (2) on the other individual amici (Messrs. Lundgren and Hollaar) identified therein, at the addresses therein, and (3) on the following additional counsel identified, at the listed addresses, in the Certificate of Service submitted with the Brief for Defendant-Appellant Microsoft: Ms. O'Sullivan and Mr. Schwartz.

I have served the above-mentioned letter and attachments by facsimile with the following exceptions: Messrs. Burton, Getman, Hollaar, and Lundgren have, with their consent, been served by first-class mail only.

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Laura Bennett Peterson